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No. 07-1529

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

OPENING SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. *Jackson* Best Protects The Distinct Interests Of The Sixth Amendment 2

II. Overruling *Jackson* Would Create Significant Practical And Doctrinal Difficulties 9

III. *Stare Decisis* Strongly Supports Adhering To *Jackson* 14

A. No Special Justification Exists To Overrule *Jackson* 15

B. This Case Is A Particularly Poor Vehicle For Reconsidering *Jackson* 18

IV. Even If The Court Were To Overrule *Jackson* In Part, It Should Retain As Much Of *Jackson*'s Sixth Amendment Rule As Is Necessary To Prevent Police Overreaching And Should Hold Montejo's Statement Inadmissible Under That Rule 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Arizona v. Mauro, 481 U.S. 520 (1987) 12

Colorado v. Spring, 479 U.S. 564 (1987) 3

Dickerson v. United States, 530 U.S. 428 (2000)..... 15, 16, 17

Edwards v. Arizona, 451 U.S. 477 (1981) 2

Estelle v. Smith, 451 U.S. 454 (1981) 7

Fellers v. United States, 540 U.S. 519 (2004)..... 8, 9

Hamilton v. Alabama, 368 U.S. 52 (1961) 5

Maine v. Moulton, 474 U.S. 159 (1985)..... 2, 3, 4, 8, 13

Massiah v. United States, 377 U.S. 201 (1964)..... 5, 6

McNeil v. Wisconsin, 501 U.S. 171 (1991) 3, 17

Michigan v. Harvey, 494 U.S. 344 (1990) 17

Michigan v. Jackson, 475 U.S. 625 (1986) . 1, 16, 17

Miranda v. Arizona, 384 U.S. 436 (1966)..... 2

Missouri v. Seibert, 542 U.S. 600 (2004)..... 1, 14, 18, 20, 21

Moran v. Burbine, 475 U.S. 412 (1986)..... 3, 6, 7, 21, 23

Payne v. Tennessee, 501 U.S. 808 (1991)..... 15, 16

Patterson v. Illinois, 487 U.S. 285 (1988) .. 8, 11, 17

Pearson v. Callahan, 129 S. Ct. 808 (2009) 16

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 15, 16

Powell v. Alabama, 287 U.S. 45 (1932) 1, 4

Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) 12

Texas v. Cobb, 532 U.S. 162 (2001) 14, 17, 21

United States v. Henry, 447 U.S. 264 (1980) 7, 9

Vasquez v. Hillary, 474 U.S. 254 (1986) 15, 16

White v. Maryland, 373 U.S. 59 (1963) 5

INTRODUCTION

This Court should not overrule *Michigan v. Jackson*, 475 U.S. 625 (1986). For more than 70 years this Court has recognized that a person facing a criminal prosecution "requires the guiding hand of counsel at *every* step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis added). *Jackson* safeguards the Sixth Amendment's entitlement to the "guiding hand of counsel" by barring the police from bypassing a defendant's attorney and interrogating the defendant after the right to counsel has attached. The defendant who is not allowed to rely on his counsel in deciding whether to accede to police questioning has not received the protection of the Sixth Amendment, regardless whether his decision could be considered coerced under the Fifth Amendment. To hold otherwise would both run afoul of this Court's many cases finding that the Sixth Amendment protects an interest distinct from the Fifth, and replace *Jackson*'s bright-line rule with a voluntariness standard that would be far harder to administer.

Stare decisis also counsels strongly against disturbing this decades-old constitutional precedent. To the extent there are concerns that *Jackson* interferes with a defendant's free will, this is not the case to redress those concerns. In this case, there is no plausible reading of the Sixth Amendment that would make Montejo's statements admissible. With or without *Jackson*, this Court should not endorse a regime in which the police may secure adversarial advantage by circumventing the role of defense counsel. *See Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment).

ARGUMENT

I. *Jackson* Best Protects The Distinct Interests Of The Sixth Amendment.

This Court has repeatedly observed the distinct protection the Sixth Amendment guarantees a defendant who has been charged with a crime: the right "to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The *Jackson* rule represents a narrow, but important application of that principle: once the Sixth Amendment right to counsel has attached, and the defendant has counsel (or has requested counsel), the State may not circumvent the lawyer to initiate interrogation of the defendant.

As this case came to the Court, a minority of states as *amici curiae* contended that *Jackson* is unnecessary in light of the Fifth Amendment protections provided by *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981). That argument fundamentally misconceives the Sixth Amendment underpinnings of the *Jackson* rule and the distinct Sixth Amendment interests it protects.

Miranda and *Edwards* do not render *Jackson* redundant because they safeguard an entirely different constitutional guarantee. The Fifth Amendment does not guarantee the right to counsel as such; it prohibits the state from compelling self-incrimination or coercing confessions. Thus, the defendant's right to request counsel during custodial interrogations under Fifth Amendment cases like *Miranda* and *Edwards* serves the purely

instrumental role of ensuring that confessions are voluntary. *See, e.g.*, *Colorado v. Spring*, 479 U.S. 564, 572-73 (1987). This Fifth Amendment rule and cases decided under it are not concerned with protecting any right to counsel apart from that instrumental purpose.

In sharp contrast, the right to counsel is not an instrumental tool to enforce the Sixth Amendment. It *is* the Sixth Amendment. Rather than being one among many tools to prevent coerced confessions, the Sixth Amendment guarantees a defendant the distinct right "to rely on counsel as a 'medium' between him and the State." *Moulton*, 474 U.S. at 176. Unlike the Fifth Amendment, which applies to custodial interrogations whenever they may occur, the Sixth Amendment right is a temporally limited one that "becomes applicable only when [a prosecution begins and] the government's role shifts from investigation to accusation." *Moran v. Burbine*, 475 U.S. 412, 430 (1986). And unlike the Fifth Amendment, which applies to interrogations pertaining to any crime, the right to counsel is offense-specific, and applies only to those charges the government has taken steps to prosecute. *McNeil v. Wisconsin*, 501 U.S. 171, 178-79 (1991). These limitations on the right to counsel are tailored to its purpose "to protec[t] the unaided layman at critical confrontations with his expert adversary, the government, after [their] adverse positions … have solidified with respect to a particular alleged crime." *Id.* at 177-78 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)) (alteration in original, internal quotation marks omitted).

Because the Fifth and Sixth Amendments serve different purposes, it is category error to conclude that a Fifth Amendment *Miranda-Edwards* regime could substitute for the Sixth Amendment right to the assistance of counsel that *Jackson* safeguards. *Miranda-Edwards* would allow the State to bypass a defendant's lawyer and obtain an uncounseled waiver of the Sixth Amendment right to counsel directly from the defendant even after he has been formally charged through judicial process and the State stands in an adversarial position to him as his accuser. While such a "waiver," and any subsequent statements, might not be coerced within the meaning of the Fifth Amendment, that process would deprive the "unaided layman" of having his counsel act as his intermediary during a "critical confrontation" with the prosecution. Contrary to the Sixth Amendment's very purpose of ensuring the defendant is able to obtain the advice of counsel, the defendant would be required to make an *uncounseled* decision whether to talk to the police. The Sixth Amendment would mean little if the State could act in this way to "circumvent[] and thereby dilute[] the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171.

This Court has recognized the importance of counsel's advisory role under the Sixth Amendment for more than 70 years. In *Powell*, it observed that a person haled into court on criminal charges "requires the guiding hand of counsel at *every* step in the proceedings against him." 287 U.S. at 69 (emphasis added); *see also id.* at 57 (noting that "during perhaps the most critical period of the proceedings

against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense"); *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961) ("The guiding hand of counsel is needed prior to trial lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." (internal quotation marks omitted)); *White v. Maryland*, 373 U.S. 59 (1973) (Sixth Amendment protects a defendant's interactions with the authorities in post-charge, pre-trial setting).

Justice Stewart therefore was on firm ground when, in writing for the Court in *Massiah v. United States*, 377 U.S. 201, 205 (1964), he referred back to *Powell* in endorsing the rule that "the Constitution required reversal of the conviction" where a

> confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. . . . [U]nder our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. . . . [A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under

> interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."

Id. at 204 (internal quotation marks omitted).

The Court's longstanding commitment to protecting the right to counsel in pretrial phases of prosecutions does not reflect concerns about compelled self-incrimination, but rather about the fairness of adversarial process. As a result, this Court has repeatedly found, both before and after *Jackson*, that confessions that were not coerced within the meaning of the Fifth Amendment would nevertheless be inadmissible because they were acquired in violation of the Sixth Amendment.

Moran v. Burbine, 475 U.S. 412 (1986), issued less than a month before *Jackson*, is illustrative. In *Moran,* the police gave the defendant a *Miranda* warning and obtained an inculpatory statement without telling him that his counsel was trying to reach him.

The Court held that the statements were admissible under the Fifth Amendment: "Once it is determined that a suspect's decision not to rely on his rights was *uncoerced*, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete." 475 U.S. at 422-23 (emphasis added). But the Court unanimously agreed that had the defendant's Sixth Amendment right attached, the

questioning would not have been allowed, even with a *Miranda* waiver: "we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a "'medium' between the suspect and the State" during the interrogation." *Id.* at 428 (internal quotation marks and alterations omitted).

Several other cases reinforce this point in the context of voluntary statements made to police informants. In *United States v. Henry*, 447 U.S. 264 (1980), the Court concluded that a defendant's post-indictment statements to a paid jailhouse informant were elicited in violation of the Sixth Amendment. The Court reasoned that although "the Fifth Amendment has been held not to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion[,] … those cases are not relevant to the inquiry under the Sixth Amendment here whether the Government has interfered with the right to counsel of the accused." *Id.* at 272.[1] *See*

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[1] This Court has further recognized that, where it applies, the right to assistance of counsel is the right that gives teeth to other rights, including Fifth Amendment rights. *See Estelle v. Smith*, 451 U.S. 454, 471 (1981) (noting that subsequent to initiation of prosecution, a defendant should not be forced to make a determination concerning whether to assert a Fifth Amendment privilege without the "guiding hand of counsel", as the determination "depends upon legal advice from someone who is trained and skilled in the subject matter" and "requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of

also Moulton, 474 U.S. at 180 (drawing same distinction in context of informant outside of jail). In these cases, it was clear that the defendant's statements were voluntary (indeed, they were not even custodial statements), and equally clear that they were barred by the Sixth Amendment.

Most recently, in *Fellers v. United States*, 540 U.S. 519 (2004), the Court unanimously reaffirmed that post-indictment statements made during a noncustodial interrogation violated the Sixth Amendment, even though they would be admissible under the Fifth Amendment. Citing *Michigan v. Jackson*, the Court noted that "we have expressly distinguished [the Sixth Amendment] standard from the Fifth Amendment custodial-interrogation standard." *Id.* at 524.

The *Jackson* rule also accommodates practical reality. Thus, *Jackson*'s protections do not arise unless and until the defendant "has a lawyer" or "requests the assistance of counsel." *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988). That limitation is sensible, given that until that point there is no counsel (or imminent counsel in the case of a request) for the defendant to "rely on," or through whom the police can communicate. Nor does *Jackson* bar the defendant from approaching the police on his own to make a statement. Such a statement by definition does not stem from police interference with the defendant's right to rely on

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possible alternative strategies at the sentencing hearing.") (alteration in original; internal quotation marks omitted).

counsel. *Cf. Fellers*, 540 U.S. at 523 ("We have held that an accused is denied 'the basic protections' of the Sixth Amendment 'when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel") (citation omitted).

This case strikes at the core of the Sixth Amendment interests properly protected by *Jackson.* Montejo faced a charge of capital murder and had been appointed counsel with whom he never even had the chance to consult. Even leaving aside the fact that the police falsely told Montejo that he lacked an attorney when they sought his waiver, *see infra*, it was a violation of the Sixth Amendment for the police to seek his uncounseled waiver in the first place. That Montejo signed a *Miranda* waiver does not overcome the ultimate fact: the State "interfered with the right to counsel of the accused by deliberately eliciting incriminating statements." *Henry*, 447 U.S. at 272.

II. Overruling *Jackson* Would Create Significant Practical And Doctrinal Difficulties.

Jackson not only properly safeguards the Sixth Amendment's right to counsel, but also has the virtue of being an easily administered bright-line rule. In contrast, replacing *Jackson* with a *Miranda-Edwards* regime would create a host of difficulties that would cloud the Sixth Amendment for years to come, as well as create undesirable incentives for the police.

First, if *Jackson* is overruled, it will lead to innumerable questions about when a defendant has made a sufficiently precise request for counsel vis-a-vis an interrogation. In addition to questions surrounding post-appointment interrogations generally, confusion is bound to arise from the very process by which counsel is appointed. In most jurisdictions, the appointment process takes place through a colloquy with the defendant. Whether a defendant makes an unambiguous request for counsel to assist with interrogations at the time of appointment will depend upon such factors as whether the defendant accepts counsel in a jurisdiction that informs him that he has the right to assistance of counsel at all stages of a prosecution, or says upon acceptance that he does not want to talk to the police. The *Edwards* analysis would vary upon such formalities as whether a jurisdiction requires a defendant to request counsel, or provides counsel to indigent defendants without request, or indeed whether the defendant is given a chance to speak at all at the hearing. The analysis will be further complicated in the many cases (including this one) where there is no transcript of the hearing.[2]

Indeed, adopting an *Edwards* rule after counsel has been appointed or requested will put the courts in exactly the position that the Louisiana Supreme Court believed itself to be in this case: attempting to determine whether the defendant had sufficiently

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[2] See Transcript of Oral Argument at 36:24-37:1 ("JUSTICE STEVENS: Louisiana does not does not provide a transcript of all these hearings, does it? MS. LANDRY: No, Your Honor.").

invoked his right to counsel on the basis of an untranscribed hearing. Under *Edwards*, Montejo's silent assent to appointment of counsel might not suffice, whereas procedures in other states that require a defendant to affirmatively request counsel or verbalize assent to appointment would. The important interests protected by the Sixth Amendment should not turn on such formalities, particularly where uncounseled defendants have no understanding of their significance.

Second, replacing *Jackson* with *Miranda-Edwards* will require the courts to develop adequate waiver language to deal with the particular context of the Sixth Amendment. For the defendant who has already obtained counsel, the traditional *Miranda* warning ("You have the right to counsel. If you cannot afford counsel, counsel will be appointed for you.") is not merely insufficient; it is affirmatively misleading. It implies that the defendant does not have counsel when he does.[3] And it does not make clear to the defendant who has obtained counsel what more he has to do to invoke his Sixth Amendment rights. [4]

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[3] *Patterson*, in contrast, held that a *Miranda* warning is sufficient to inform a defendant of his post-attachment rights in a completely different situation: where he "had not retained, or accepted by appointment, a lawyer [or] even request[ed]" one. 487 U.S. at 290 n.3. Consequently, the confusion that *Miranda* creates for a counseled defendant was not at issue in *Patterson*.

[4] The fact that *Miranda-Edwards* applies only to custodial interrogations may cause further confusion. Under *Jackson*, the police may not show up at the home of a

Proper waiver language concerning interrogations will be only the beginning of the problem because pre-trial post-attachment interrogations are but one of many critical stages. *See Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2594 (2008) (Alito, J., concurring) (cataloging critical stages). Overruling *Jackson* implies that the police will be free to seek uncounseled waivers of counsel at all pre-trial critical stages. Consequently, courts will need to decide upon waiver language that is sufficient to advise the defendant of his right to counsel in the context of pre-trial line-ups, psychiatric exams, and the like. Again, until those questions are resolved, the admissibility of evidence obtained at those critical stages will be in doubt.

Indeed, tethering the validity of post-attachment custodial interrogations to the Fifth Amendment "voluntariness" test would call into question the many cases discussed in Part I that distinguish fundamentally between the protections of the two Amendments. If voluntariness is all that is required, then cases like *Henry* and *Moulton*, which held that voluntary statements made to undercover informants are inadmissible under the Sixth Amendment, should arguably come out the other way. *Compare, e.g., Arizona v. Mauro*, 481 U.S. 520 (1987) (permitting taping under Fifth Amendment)

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counseled defendant to question him after the Sixth Amendment right has attached, even if that questioning were found to be non-custodial. If *Jackson* were replaced by *Miranda*, it is not clear whether the police would even need to give a *Miranda* warning absent a custodial interrogation.

with *Maine v. Moulton*, 474 U.S. 159 (1985) (holding that the government could not introduce surreptitiously recorded statements into evidence after the right to counsel had attached (Sixth Amendment), but could do so in the pre-attachment (Fifth Amendment) context).

Third, all of these problems will be exacerbated because overturning *Jackson* would give the police a strong incentive to try to reach defendants before they have had a chance to consult with counsel. That is precisely what happened here. As Petitioner's opening brief recounted, the police reached Montejo shortly after he was appointed counsel, but before Montejo had a chance to meet with him. The police then obtained the uncounseled "waiver," and removed Montejo from the jail. To no one's surprise, when they returned they found Montejo's lawyer waiting at the jail "pretty upset that [the police] had been out with [him]." Opening Br. at 9-10.

Overturning *Jackson* would thus condition Sixth Amendment protections on the outcome of a race between the police and appointed defense counsel to meet with the defendant.[5] Effective defense counsel will rush to clients with clear instructions to invoke

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[5] Such an approach will disproportionately impact indigent defendants in jurisdictions with over-extended, understaffed, and under-resourced public defender systems. The *Jackson* rule ensures that the waiver of the Sixth Amendment right to counsel does not depend on arbitrary factors such as the speed with which defense counsel arrives at the jailhouse doors.

Edwards protections, while prosecutors and police officers attempt to outpace defense counsel in order to obtain one last unobstructed interrogation with the accused.[6] And courts will be forced to engage in the difficult and laborious task of deciding when the police have gone too far in using procedures "designed to circumvent" and "undermine[]" Sixth Amendment protections. *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring in the judgment).

Jackson's bright-line rule obviates all of these serious problems, ensuring the police and the defense know what post-attachment conduct is permissible, while allowing a defendant to come forward and confess to the police of his own accord. *See Texas v. Cobb*, 532 U.S. 162, 182 (2001) (Breyer, J., dissenting) ("[Under *Jackson*, a] suspect may initiate communication with the police, thereby avoiding the risk that the police induced him to make, unaided, the kind of critical legal decision best made with the help of counsel, whom he has requested.").

III. *Stare Decisis* Strongly Supports Adhering To *Jackson*.

For the reasons set forth above, the rule of *Jackson* is both jurisprudentially sound and eminently practical. Thus, even if this were a matter of first impression, the Court would rightly adopt the very same Sixth Amendment rule today. But this is not a matter of first impression. It concerns a

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[6] Counsel who failed to contact their clients quickly could be deemed ineffective under this scenario, adding further complexity and delay to prosecutions.

precedent that has been the firmly established law for nearly a quarter century, has been repeatedly cited and followed, and is fully consistent with the Court's Fifth and Sixth Amendment decisions over that entire time.

A. No Special Justification Exists To Overrule *Jackson*.

The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillary*, 474 U.S. 254, 265-66 (1986); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"). Although *stare decisis* is not an "inexorable command," this Court has repeatedly recognized that precedents, including constitutional precedents, should not be overturned absent "some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). (quoting *State Oil v. Khan*, 522 U.S. 3, 20 (1997) and *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996)) (internal quotation marks omitted).

Typically, the Court's *stare decisis* analysis considers whether the "governing decisions are unworkable," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); whether "subsequent cases have undermined their doctrinal underpinnings," *Dickerson*, 500 U.S.

at 443; whether any factual premises underlying the prior holding have so changed as to render the holding irrelevant or unjustifiable, *see Casey*, 505 U.S. at 855; *Vasquez*, 474 U.S. at 266; and whether the governing decision is "badly reasoned." *Payne,* 501 U.S. at 827. None of those considerations supports overturning *Jackson*.[7]

First, *Jackson* is not unworkable. To the contrary, its bright-line rule is easy to apply, and its limits on the interrogation of a counseled defendant have become "embedded in routine police practice." *Dickerson*, 530 U.S. at 443. Supplemental Br. of Amicus Curiae Larry D. Thompson, William Sessions, et al. 8-12 (prosecutors understand that they cannot interrogate a counseled defendant in the absence of his attorney). Neither this Court nor lower courts, nor the State amici have suggested that *Jackson*'s bright-line rule is difficult to administer. And the alternatives to *Jackson* are likely to create far more problems than they solve. *See supra*.

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[7] Nothing in *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 201 (2001)), suggests a lesser standard for overruling *Jackson*. While the Court held that *stare decisis* was not a substantial obstacle to overruling a "judge-made rule that was recently adopted to improve the operation of the courts," 129 S. Ct. at 816, *Jackson* is a 23-year old constitutional decision that implements the Sixth Amendment's "purpose of protecting the unaided layman at critical confrontations with his adversary." 475 U.S. at 631 (internal quotation marks omitted). Different considerations thus apply.

Second, the core principles of *Jackson* remain intact even as subsequent cases have clarified the scope of its rule. *See, e.g.*, *Michigan v. Harvey*, 494 U.S. 344, 353 (1990) (permitting use of statements for impeachment); *Patterson*, 487 U.S. at 291 (holding that *Jackson* does not apply unless defendant has or requests a lawyer); *McNeil*, 501 U.S. at 175 (invocation of right is specific to the charged offense); *Cobb*, 532 U.S. at 168 (*Jackson* is offense-specific). Far from undermining *Jackson*, these cases have "reduced the impact of the … rule on legitimate law enforcement while reaffirming [its] core ruling" that uncounseled statements resulting from police-initiated interrogation after the defendant has counsel cannot be used as evidence in the prosecution's case-in-chief. *Dickerson*, 530 U.S. at 443.

Third, none of the factual premises underlying *Jackson* have been rendered irrelevant in the intervening years. To the contrary, as explained above, it would disrupt and confuse the fabric of Fifth and Sixth Amendment law to overrule *Jackson* and replace it with a Fifth Amendment rule designed to protect a completely different constitutional right. *Jackson*'s core insight that an "unaided layman" requires the protection of counsel when "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law," 475 U.S. at 631, remains as valid today as it was when *Jackson* was decided. Indeed, given that the vast majority of criminal prosecution end before trial in a plea bargain, the

need for the advice of counsel at the early stages of a prosecution is greater than ever.

Finally, as set forth in more detail above, *Jackson* is not "badly reasoned" or "unsound in principle." Just the opposite is true. The *Jackson* rule flows from the very text of the Constitution and protects the very core of the Sixth Amendment right to counsel. *See supra*.

Whatever this Court might do if writing on a clean slate, there is plainly no "special justification" that warrants overturning *Jackson* now.

B. This Case Is A Particularly Poor Vehicle For Reconsidering *Jackson*.

This case is a particularly poor vehicle to consider replacing *Jackson* with a *Miranda-Edwards* regime because the police behavior pressured and deceived Montejo in "a calculated way to undermine" the protections of *Edwards*, *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), and to prevent him from consulting with his lawyer. The case is thus the polar opposite of a knowing, voluntary, and intelligent waiver of the right to counsel that application of *Edwards* to the Sixth Amendment would purportedly protect.

As Petitioner's opening merits brief explained, the waivers at issue here were the result of pressure and deceit on the part of the police that reflect a consistent effort to prevent consultation with counsel. Even prior to the 72-hour hearing, for example, Montejo was subjected to a series of harsh tactics by the police to dissuade him from relying on counsel. *See* Opening Br. of Petitioner 31

(recounting that when Montejo asked for a lawyer, the police responded by telling him they were going to charge him with first-degree murder).

Then, after the hearing, the police interposed themselves to interrogate Montejo prior to his lawyer's arrival. Montejo testified that, when approached by the police approached shortly after his counsel had been appointed, Montejo told the police "I think I got a lawyer appointed to me"; the police falsely told him "No, you don't …. I checked, you don't have a lawyer appointed to you." Opening Br. of Petitioner 8. Montejo thus "waived" his right to counsel only after facing days of pressure from the police not to rely on counsel and after wrongly being told that he did not have counsel. It was on the basis of this "waiver" that the police took Montejo away from the jail and obtained a confession, only to return to find Montejo's lawyer waiting at the jail "pretty upset that [the police] had been out with [him]." Opening Br. of Petitioner 9-10.

These facts take this case light years away from the paradigm of an autonomous defendant making a "free choice" to forgo the "assistance of counsel for his defense." Most obviously, the fact that the police falsely told Montejo that he did not have a lawyer is enough to invalidate any purported waiver.[8] And,

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[8] The State has taken the position that Montejo's testimony on this point is untrue. But the Louisiana Supreme Court did not so hold. It declined to make a finding on this point, reasoning instead that the police would have been permitted to lie about the status of Montejo's counsel in any case under this Court's decision

unlike *Texas v. Cobb*, where the police had repeatedly obtained consent from Cobb's counsel prior to talking to him, here the police entirely bypassed Montejo's counsel to obtain a waiver at a critical moment in the case. Reply Br. of Petitioner 13-14.

Instead, the case is more like *Seibert*, where the police engaged in a "deliberate violation" to "obscure both the practical and legal significance of the admonition when finally given." 542 U.S. at 620. Here, as in *Seibert*, the persistent efforts of the police to discourage Montejo's exercise of the right to counsel including by denying the appointment of counsel at the 72-hour hearing could only have led Montejo to conclude that, as a practical matter, the right to counsel "did not exist." *Id.*

Overruling a constitutional precedent is an extraordinary step that should only be taken in an appropriate case. This is not that case. Even if this Court were to believe that the Sixth Amendment's right to the assistance of counsel would be adequately served by an "*Edwards*-type-regime," the Court should not impose that regime where the waiver at issue is the product of pressure and

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in *Moran*. *State v. Montejo*, 974 So. 2d 1238, 1261-63 (La. 2008). That reading of *Moran* is plainly erroneous given the decision's clear statement that the Sixth Amendment forbids the police from taking steps to interpose themselves between a defendant and his counsel. In any case, it is undisputed the police did not tell Montejo that he had counsel. As discussed in Part IV, that is sufficient to require reversal under any Sixth Amendment standard.

deception intended to undermine the very "free choice" that the Court wants to protect. Indeed, as discussed in the next section, even if this Court were inclined to overrule *Jackson* in a case where its operation impeded the admissibility of a statement plainly made as a result of the defendant's free will, this is not that case. The police overreaching in this case invalidates the waiver under any plausible Sixth Amendment standard. *Stare decisis* counsels in favor of leaving a long-standing constitutional precedent undisturbed where it would not make a difference in the outcome of the case.

IV. Even If The Court Were To Overrule *Jackson* In Part, It Should Retain As Much Of *Jackson's* Sixth Amendment Rule As Is Necessary To Prevent Police Overreaching And Should Hold Montejo's Statement Inadmissible Under That Rule.

Even if the Court concludes (and it should not) that the breadth of *Jackson* is improvident because it can operate to "supersede[s] the suspect's voluntary choice to speak with investigators," *Cobb*, 532 U.S. at 175 (Kennedy, J., concurring), a portion of the *Jackson* rule should be retained insofar as it forbids the police to initiate interrogation of a defendant who has a Sixth Amendment right to counsel and who has obtained or requested counsel when the interrogation is "designed to circumvent" and "undermines" *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring in the judgment) the "efforts of a defendant's attorney to act as a "medium between [the suspect] and the State' during the interrogation" *Moran*, 475 U.S. at 428.

As explained above, Montejo testified that the police falsely told him that he did not have a lawyer when they sought his *Miranda* waiver. The police offered conflicting testimony, improbably asserting that they were not aware that Montejo had counsel appointed at his 72-hour hearing, even though they knew it was a capital case, and that the very purpose of the hearing was to appoint counsel.[9] Reply Br. of

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[9] At oral argument, counsel for the State could offer no explanation for this discrepancy:

JUSTICE GINSBURG: This is an experienced police officer. The 72-hour hearing is required in every case …. So how could an experienced police officer not know? Somebody, by the way, who knew this man had been kept until – even more than 72 hours. And he testifies … I didn't know that he appointed – had been appointed a lawyer. The very same day that he got to the 72-hour hearing a day late, how could he not have known?

MS. LANDRY: I can't answer that question. I can only answer the question that all of the officers testified that they were not aware that counsel had been appointed for the defendant that morning.

JUSTICE KENNEDY: Well, of course, they know – it's a death case – that counsel is going to be appoint – or it's a murder case – that counsel is going to be appointed. Everybody knows that except this defendant. He doesn't know; of course he doesn't know.

MS. LANDRY: I understand. They testified that they weren't aware that counsel had not been appointed that morning.

Transcript of Oral Argument at 30:18-31:13.

Petitioner 14-16. Even if one credited the police's unlikely version of the events, that would not change the fact that by their own account they failed to inform Montejo that he actually had counsel when they sought his *Miranda* waiver. Whether the police lied to him on this point, or simply omitted that key fact, Montejo was misinformed about the true status of his counsel, and his waiver should not be credited. *See Moran*, 475 U.S. at 428 (*Miranda* waiver insufficient under Sixth Amendment where police fail to inform the defendant that he already has counsel).

An alternative rule, which would allow the police to seek a waiver through falsehoods or careful omissions, would make a mockery of the Sixth Amendment's guarantee of assistance. Thus, because the evidence is undisputed that Montejo was not given accurate information about his counsel at the time he received his *Miranda* warning, reversal of the Louisiana Supreme Court decision is still required even if this Court were to overrule *Jackson*.

CONCLUSION

This Court should not overrule *Jackson*, and the judgment of the Louisiana Supreme Court should be reversed.

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